

## Case Notes

# RIGHT TO RECEIVE VERSUS RIGHT TO APPROPRIATE PROCEEDS OF INSURANCE POLICY CEDED IN SECURITATEM DEBITI: RETMIL FINANCIAL SERVICES (PTY) LTD V SANLAM LIFE INSURANCE COMPANY LTD AND OTHERS

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## I INTRODUCTION

*Retmil Financial Services (Pty) Ltd v Sanlam Life Insurance Company Ltd and others* [2013] 3 All SA 337 (WCC) highlights important aspects regarding the use of incorporeals as objects of credit security. The judgment sheds some light on the (or at least a) solution to a tricky question: what should happen when the ceded claim (in casu one deriving from a life insurance policy) becomes payable but the debt secured by the cession is not yet enforceable? What are the rights and duties of the cedent and cessionary under these circumstances if their contract makes no express provision for this situation? The judge resolved the problem — based on what the parties would have intended in view of the purpose of the transaction — by drawing an interesting distinction between the cessionary's right to *receive* (and keep in trust) and its right to *appropriate* the proceeds of the ceded insurance policy. The case also confirms certain principles regarding the cessionary's duty of care with respect to the ceded asset, as well the content of the cedent's retained interest.

## II FACTS AND LEGAL PROBLEMS

Slabbert was a member of a close corporation that borrowed an amount of money, repayable in monthly instalments, from Retmil. As security for the close corporation's loan, Slabbert bound himself as surety for and

co-principal debtor of the close corporation and he ceded his right, title and interest in a Sanlam life insurance policy to Retmil as security for the fulfilment of this obligation. After Slabbert's death, the close corporation continued to pay the monthly instalments due to Retmil and at no point in time was it in default.

Retmil notified Sanlam of Slabbert's death and requested payment of the proceeds of the policy. Sanlam informed Retmil that it was only willing to pay out a reduced amount and not the full value of the policy. The reason for this was the alleged non-disclosure of certain information by Slabbert when he took out the policy. Retmil informed the executor of Slabbert's estate of the reduced offer and, after negotiations, allowed the executor time to consider purchasing Retmil's claim for the amount offered by Sanlam. When the executor requested more time as well as a copy of the cession document, Retmil refused and notified Sanlam that it accepted the reduced payment offer. The executor then sent an email to Sanlam, questioning the validity of the cession and requesting the proceeds of the policy to be paid to the estate and not to Retmil. The executor raised two issues, namely that the amount outstanding on the loan was less than the amount offered on the policy, and furthermore that the close corporation was up to date with its obligations under the loan.

Retmil's contention was that, as cessionary and 'owner' of the policy, it was entitled to accept Sanlam's offer. It also argued that, just because the loan was up to date, it did not justify non-payment of the policy to Retmil. On the other hand, the executor argued that Retmil, as cessionary, was not the 'owner' of the policy, since this was not an out-and-out cession but a security cession ('sydelingse sessie'), and because the estate was the 'owner' of the policy, the proceeds had to be paid to the estate. Furthermore, the executor maintained that Retmil was only entitled to the outstanding balance of the loan and that the balance had to be paid to the estate. The executor also took issue with Retmil's supposed entitlement to accept a lower payment than the full value of the policy, since this action allegedly amounted to reckless conduct that disregarded the interests of the cedent's estate. He further contended that, as executor, he was duty bound to challenge Sanlam's decision to reduce the amount payable under the policy. Also, Retmil could not insist on immediate payment of the proceeds (hence, enforcing its security), since the close corporation had not yet defaulted on the loan. (For the facts of the case, which were not disputed, see *Retmil* paras 3–21.)

The court (Davis AJ) explained that the problem in this case was that Slabbert (the cedent/pledgor) had died and therefore the policy had

become payable but the loan owed by the close corporation (which the cession secured) was not yet due and payable. Furthermore, Sanlam had offered an amount less than the value of the policy and Retmil had accepted it; yet this election potentially prejudiced the interests of Slabbert's estate. Hence, the dispute essentially revolved around the question who was entitled to deal with the policy: the executor of the cedent's estate or Retmil as cessionary (see *Retmil* paras 22–23).

### III BROADER BACKGROUND TO THE LEGAL PROBLEM

The legal nature and consequences of the transactions through which personal rights (incorporeal movable things) are given as security for the fulfilment of an obligation — usually labelled a cession in *securitatem debiti* — have been controversial for many years. The issue that has caused much deliberation over the years is how a cession for security purposes differs from an 'out-and-out', 'outright' or 'absolute' cession. Some argue that there can be no difference, whereas others assume that it should follow the consequences of a pledge. It may even be that both options are possible, or that South African law knows a *sui generis* security cession that transcends the theoretical alternatives. (For more detail on the law of cession in general but especially the differing doctrinal constructions, see Scott, *The Law of Cession* 2 ed (Juta 1991) ch 12; Lubbe, 'Cession' (original text by Nienaber) in Joubert & Faris (eds), *The Law of South Africa* 3 ed (LexisNexis 2013) paras 179–183; Van der Merwe et al, *Contract: General Principles* 4 ed (Juta 2012) 424–425.)

Davis AJ commenced his judgment by stating that the case 'brings into sharp focus the uncertain correlation between the interest retained by the cedent and the interest gained by the cessionary under a cession *in securitatem debiti*' (*Retmil* para 1). This correlation — and the different ways in which it can be construed — is indeed the central controversy underlying this area of law. If the cedent retains 'ownership' of the claim, what is transferred to the cessionary? If the cessionary receives the exclusive right to enforce the claim, what is left of the 'ownership' retained by the cedent? These two parties' relationship to the original debtor (the person who owns an obligation with respect to the ceded right, in this case the insurer) is also an important and complicated matter.

In line with the current mainstream trend (see *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) especially paras 17, 24; for a discussion, see Scott, 'One hundred years of security cession' (2013) 25(4) *SA Merc LJ* 513), it was accepted that the transaction in *Retmil* was a cession in security and analogous to a pledge — placing the cedent in the position of a pledgor

and the cessionary in that of a pledgee (*Retmil* paras 25–30). In addition to confirming the pledge construction (para 26), the following two general points are noteworthy in light of the issues addressed in the case. First, only the cessionary/pledgee has *locus standi* to enforce the ceded right, but by virtue of the cedent's/pledgor's reversionary interest ('bare dominium'), the cedent also enjoys a limited *locus standi* — albeit not to enforce the right but to protect their interest in it (paras 28–29). Secondly, as pledgee the cessionary is under a duty to exercise due diligence with respect to the right and to protect the cedent's interests therein (para 30).

### IV THE COURT'S DECISION

#### (a) Introduction

The court explained that the case turned on the rights of the pledgor (the executor representing the estate) and the pledgee (*Retmil*): First, did the cession afford *Retmil* the entitlement to demand immediate payment of the proceeds to discharge the loan, even though repayment of the loan was not due yet; and secondly, did the cession entitle *Retmil* to accept Sanlam's reduced payment offer? What was the content of the pledgee's security interest? Thirdly, did the 'reversionary interest' that remained with the pledgor (the estate) entitle the executor to deal with Sanlam in an attempt to obtain an increased payment on the policy? (What was the content of the pledgor's 'bare dominium?') (*Retmil* para 24). In what follows, these various aspects of the court's decision are discussed.

#### (b) Immediate payment of the proceeds of the policy

Is it possible for the cessionary (*Retmil*) to demand immediate payment of the proceeds of the policy in order to discharge the loan? Because of Slabbert's death, the obligation under the ceded personal right (life insurance policy) had become payable, but the problem was that there was not yet any default on fulfilling the obligations under the loan between *Retmil* and the close corporation. Therefore, the ceded personal right became enforceable but the pledge was not yet susceptible to foreclosure. In such a case, which party may (or must) receive payment of the ceded personal right? The cedent no longer has *locus standi* to enforce the personal right, but the cessionary cannot yet enforce its rights to claim the proceeds of the pledge. As Davis AJ put it, the question is 'what the rights of the cessionary are when there has been no default in respect of the secured debt, but the principal or ceded debt has fallen due for payment' (*Retmil* para 34).

This conundrum has been pointed out by courts (see, for example, *Development Bank of Southern Africa Ltd v Van Rensburg & others NNO* 2002 (5) SA 425 (SCA) para 52; *Volhand & Molenaar (Pty) Ltd v Ruskin & another NNO* 1959 (2) SA 751 (W) at 753) and in academic discussions (see, for example, Scott, (Juta 1991) 243) before, but to my knowledge no court has yet had to deal with it definitively. Scott, (Juta 1991) 243 suggests that the German approach should be adopted, namely that the debtor must pay the pledgor and pledgee jointly, who must then jointly invest the money. This investment will then henceforth form the object of the pledge. (See §§ 1281, 1288(1) of the German Civil Code (*Bürgerliches Gesetzbuch*) and the other sources cited by Scott, (Juta 1991) 243. See also Scott, 'The comparative method in action — aspects of the law of cession (part 2)' (2001) 34 *De Jure* 1 at 17–18.) However, Davis AJ adopted a different solution.

The judge drew a distinction between the right to *receive* payment of the proceeds and the right to *appropriate* such proceeds. Until such time as the cessionary may appropriate the proceeds, it may receive them but must *preserve* them intact. Therefore, on Slabbert's death the proceeds of the insurance policy became payable and only Retmil (the cessionary) was entitled to receive the payment. However, this did not entitle Retmil to use these proceeds to discharge the loan prematurely (that is, before default) (*Retmil* para 32).

The problem was previously touched upon by Nienaber JA in his minority judgment in *Development Bank of Southern Africa Ltd* (para 52), where he was of the opinion that the rights of the cessionary would depend on the agreement between the cedent and cessionary. Davis AJ agreed that, for Retmil to go ahead and immediately apply the proceeds of the policy to discharge the loan even though there was no default on the secured debt, Retmil had to prove that it was contractually authorised to do so, either expressly or tacitly. However, Retmil neither alleged nor proved an authorisation to discharge the loan (*Retmil* para 37). Regarding the possibility of a tacit authorisation, the judge commented that it 'would be in keeping with the nature and purpose of a cession *in securitatem debiti*' if the parties intended that Retmil should in such circumstances 'be entitled to receive payment of the proceeds and retain them in trust as security, to be returned, together with accrued interest, on the expiry and discharge of the loan' (para 38). Also, it was unlikely that the cedent would have agreed to the effectual forfeiture of an asset that would otherwise be returnable to the estate when the loan is discharged (para 38).

Therefore, the court held that Retmil, as cessionary, was entitled to receive the full proceeds but subject to the duty to account and pay any

surplus to the executor of the cedent's deceased estate (para 39, citing *Kuranda v Boustred & others* 1933 WLD 49 at 53; *Rixom NO v Mashonaland Building Loan and Agency Co Ltd* 1938 SR 207 at 213). Furthermore, although Retmil had the right to receive payment of the value of the policy, it had no entitlement to consent to a lesser payment by the insurer, since on the facts of the case such consent amounted to a violation of its duty to care for the pledged asset as a *bonus paterfamilias*. Indeed, without an agreement authorising it to do so, Retmil was not entitled to deal with the proceeds it received in any way (*Retmil* para 39, citing Scott, (Juta 1991) 242; Nienaber, 'Cession' in Joubert & Faris (eds), *The Law of South Africa* part 2, 2 ed (LexisNexis 2003) para 52). Retmil as cessionary was obliged to hold the proceeds in trust as security for the due performance of the obligations under the loan and, on expiry and discharge of the loan, to return the proceeds or the balance of the proceeds with accrued interest to the executor of the cedent's estate (*Retmil* para 39). According to Davis AJ, this proposition 'caters for the interests of both the cessionary and the cedent, since the cessionary is fully secured while the cedent's asset remains intact' (*Retmil* para 39, referring to *Leyds NO v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk en andere* 1985 (2) SA 769 (A) at 780 with regard to the protection of the pledgor and his creditors). Hence, he opted for a functional approach in line with the parties' intention and both of their best interests. It can be added that, because the proceeds are held in trust, the cedent will be protected from the consequences of the cessionary's insolvency.

Consequently, Retmil was not entitled to demand immediate payment of the proceeds for the purpose of settling the loan, but only in order to retain it in trust on the cedent's behalf (para 40). However, the cessionary cannot accept such payment without having regard to how this will impact the cedent's interests.

(c) *Cessionary's/pledgee's duties: accepting the offer of reduced payment*

There were two reasons why Retmil did not have the right to accept Sanlam's offer of a reduced payment under the policy. First, it was not expressly or tacitly authorised to do so by the cedent/pledgor. Secondly, such purported acceptance failed, on the facts of this case, to give due regard to the interests of the cedent/pledgor (*Retmil* para 41).

The first reason relates to the principle in the law of pledge that, without an agreement (*pactum antichreseos*), the pledgee may not exercise any entitlements with regard to the pledged object more than

the normal passive entitlements that accompany the limited real right of pledge. (See, for example, Grotius 2.48.33; Voet 20.1.23; *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd t/a Weider Health & Fitness Centre* 1997 (1) SA 646 (C) at 654; and, in general, see further Lubbe, 'Mortgage and pledge' (revised by Scott) in Joubert & Faris (eds), *The Law of South Africa* part 2, 2 ed (LexisNexis 2008) para 427; Van der Merwe, *Sakereg* 2 ed (Butterworths 1989) 658; Scott & Scott, *Wille's Law of Mortgage and Pledge in South Africa* 3 ed (Juta 1987) 120.) In line with this right of pledge, the cessionary is entitled to receive payment of the proceeds and appropriate them when the cedent defaults, but to do so before the cedent defaults, the cessionary would need to have specific authorisation.

The second reason relates to the duty of care that a pledgee has with regard to the pledged asset in their possession. As the judge confirmed, a pledgee must act as a bonus paterfamilias when dealing with the ceded right (*Retmil* para 41). Regarding the duty of care, the judge found authority in the old case of *Vassen v Garrett* 1911 EDL 188 at 198–199, the facts of which were strikingly similar to the present problem. A fire insurance policy with regard to mortgaged buildings was ceded as supplementary security for the repayment of the mortgage debt. When the buildings were destroyed by fire, the insurer offered the cessionary a reduced payment, which the latter accepted without having regard to the cedent's interests. In that case, Kotzé JP held that the cessionary had no right to enter into a compromise with the insurer in disregard of the cedent's rights. Therefore, the cessionary was held liable for any loss suffered by the cedent as a result of the cessionary's conduct (*Retmil* para 42).

Although *Retmil* did the right thing by informing the executor that Sanlam was offering a reduced payment, *Retmil* did not tender the return of the policy to the executor against payment of the remaining balance of the loan, which would have been the correct thing to do. Instead, *Retmil* demanded payment by the executor of the full amount that Sanlam had offered in settlement of the policy, even though this amount substantially exceeded the outstanding balance on the loan. According to Davis AJ, *Retmil* was not entitled to make this demand (para 43). The executor was entitled to redeem the security by paying only the outstanding balance on the loan. But by claiming a greater amount than required to discharge the loan, *Retmil* was effectively frustrating the cedent's right to redeem the security (para 44). *Retmil* accepted Sanlam's reduced offer of payment without first giving the executor a reasonable opportunity to investigate the matter. The

executor was given only three days to do so, and the judge classified this as 'a highhanded disregard for the rights of the cedent' (para 45). *Retmil*, of course, was guaranteed to receive an amount sufficient to satisfy the loan and therefore was content with the compromised offer without challenging the validity of the reduced offer or giving the executor a fair chance to do so. Davis AJ described this conduct as falling short of the bonus paterfamilias standard (para 46). Consequently, *Retmil* was not entitled to accept Sanlam's offer of a reduced payment on the policy (para 47).

*(d) Cedent's entitlements: locus standi to engage with debtor*

Even though, as a result of the cession, the pledgor has no locus standi to enforce the personal right, can it nonetheless institute proceedings or otherwise engage with the debtor in order to protect its reversionary interest? In other words, could the executor enter into a dispute with Sanlam with regard to the validity of the offer for a reduced payment on the policy? Or, is the lodging of such a dispute in the sole discretion of the cessionary? (Compare also *Standard General Insurance Co Ltd v SA Brake CC* 1995 (3) SA 806 (A) at 815, where the court mentioned 'the thorny question of how the cedent who has divested himself of a claim can attempt to protect his rights should the cessionary refuse or fail to do so'.)

Davis AJ explained that, because the pledgor retains a reversionary interest, which forms part of his estate and has value, this interest can be protected by legal means even though he cannot enforce the ceded right (*Retmil* para 48, citing Nienaber, (LexisNexis 2003) para 53). The judge quoted from Nienaber JA's dissenting judgment in *Development Bank of Southern Africa Ltd* para 50, that this reversionary interest is an asset that itself can be attached or ceded and that it invests the cedent with locus standi to protect the pledged asset, in an appropriate case. Therefore, Davis AJ concluded that the executor of the cedent's estate was not only entitled but also duty bound to intervene and protect the cedent's reversionary interest by engaging with Sanlam with regard to the offer of a reduced payment (*Retmil* para 49).

Such locus standi for the executor would, according to the judge, entail no prejudice for *Retmil*, because the executor's intervention would only serve to increase the value of the security. Also, the deferral in payment would not prejudice *Retmil* for as long as the loan continued to be paid up (para 50). However, one of *Retmil*'s arguments was that, if the payment offer was taken on review, there was a chance that Sanlam would reject the claim entirely, which would render *Retmil*'s security

completely lost. Davis AJ responded by finding first that, on the facts, this fear was unfounded because the executor had already persuaded Sanlam to increase its offer. Secondly, the judge held that the cession could not confer on Retmil's greater rights under the policy than the cedent enjoyed. Hence, if Sanlam was justified in rejecting the claim, the consequence was that the cedent enjoyed no rights under the policy and therefore that Retmil also acquired no rights under the cession to begin with (para 51).

*(e) Ancillary point: executor of deceased state and trustee of insolvent estate*

Another question that was raised was whether the law laid down in *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 (that the trustee of the cedent's insolvent estate is entitled to administer the realisation of the pledged claim) entitled the executor of a deceased estate to administer the proceeds of the policy. Davis AJ explained that, even though an executor of a deceased estate and a trustee of an insolvent estate fulfil similar roles in many respects, the important difference lies in the existence of a concursus creditorum in the case of insolvency. Therefore, the principle in *National Bank of South Africa* only applies in the case of insolvency and not upon the death of the cedent, except if the deceased estate is insolvent (*Retmil* para 54).

*(f) Summary of findings*

To sum up the judge's main findings and the principles that the decision sets out (*Retmil* para 55):

- (i) The cessionary may not appropriate the proceeds unless there is a default on the loan. However, the cessionary may receive such proceeds when they become payable before default, in which case the proceeds must be kept in a trust. This trust account will henceforth serve as security under the pledge. Only if there is a default may the proceeds be appropriated to settle the debt, after which the surplus and accrued interest must be paid to the cedent. If the principal debt is discharged in the normal course of events, the proceeds plus interest must be paid to the cedent.
- (ii) The cessionary may not unreasonably compromise the claim under the policy — first, because its contract with the cedent does not authorise such action and, secondly, because it would amount to a violation under the law of pledge of the cessionary's duty of care towards the cedent's interests.
- (iii) Because a reversionary interest in the proceeds vests in the estate,

the cedent (or the executor of his estate) is empowered to take the necessary steps to protect the cedent's interest in the proceeds by, for instance, disputing the reduced offer of payment. This can be called a residual locus standi that correlates to the cedent's reversionary interest in the ceded right. Naturally, the cedent can only protect its reversionary interest in the proceeds if this would not prejudice the cessionary's rights.

## V DISCUSSION

The *Retmil* case is a good illustration not only of applying the pledge construction but also of the approach courts can take when faced with questions of how this pledge transaction works in practice. In the first place, the facts of the case and the problems that came up show how valuable it is for security cessions to be constructed in the nature of a pledge. If this transaction had been an absolute cession (a full transfer of the claim), the executor of the cedent's estate would have had no say in whether the cessionary could accept the reduced offer. The executor would have had no entitlement to directly engage with Sanlam (the debtor), since juridically the cedent would have been entirely out of the picture. The executor's only option would have been to hold the cessionary liable based on the fiduciary relationship between the cedent and cessionary, but this could have an unsatisfactory outcome if, for instance, the cessionary goes insolvent or otherwise does not have the means to pay for this liability. In addition, the cedent's claim for damages under the fiduciary duty would be a mere personal right against the cessionary, and will provide little solace after the fact. It is therefore easy to see that it would be better if the cedent has some say in the matter in order to try and prevent this damage from accruing. An absolute cession does not provide a legal basis for this option.

Conversely, because the transaction was accepted by the parties as analogous to a pledge, it was not difficult to conclude that, based on its reversionary interest (the bare dominium), the cedent must be able to take some kind of action to protect this residual interest, since the asset itself remained vested in the cedent. Moreover, under the principles of pledge, the cessionary (as pledgee) has certain caretaking duties that it cannot escape, even contractually (see *Nyabele v Pieterse* 1914 TPD at 516; *SA Breweries v Levin* 1934 GWLD 33 at 45). Since the cedent remains 'owner' of the asset while the cessionary receives control ('quasi-possession') of it, the latter has certain duties of care towards the owner (in general, see Lubbe, (LexisNexis 2008) para 426; Badenhorst et al, *Silberberg and Schoeman's The Law of Property* 5 ed (LexisNexis

Butterworths 2006) 393; Kritzinger, *Principles of the Law of Mortgage, Pledge & Lien* (Juta 1999) 49; Sonnekus & Neels, *Sakereg Vonnisbundel 2* ed (Butterworths 1994) 750; Van der Merwe, (Butterworths 1989) 664–665; Scott & Scott, (Juta 1987) 140–142).

The standard of care that is expected of the cessionary is that of a *bonus paterfamilias* — a reasonably careful (or diligent) person (see *Judes v SA Breweries Ltd* 1922 WLD 1 at 8; *Priest v Logie's Estate* 1926 EDL 40 at 43; *SA Breweries* at 35; *South African Breweries v Levin* 1935 AD 77 at 84; *Simon NO & others v Mitsui and Co Ltd & others* 1997 (2) SA 475 (W) at 503; *Retmil* para 30). Indeed, when it is time to return the pledged asset to its owner, and the pledgee is unable to return it in the appropriate condition, the onus is on the latter to prove that this was not a result of their fault (see *Daly v Chisholm & Company Ltd* 1916 CPD 562 at 566; *Enslin v Meyer* 1925 OPD 125 at 132–134. See also *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 at 973–974; *Deutschmann v Mpeta* 1917 CPD 79; *Oertel NO v Brink* 1972 (3) SA 669 (W) at 675). Therefore, the pledgee may not deal with the asset without having the *bonus paterfamilias's* regard to the pledgor's interests. Furthermore, under circumstances where the pledgor becomes aware of the fact that the pledgee is failing to fulfil its duties in this regard, there is no reason why the pledgor should not be able to obtain an interdict to compel the pledgee to do so.

The practical question that the judge had to deal with revolved around the exact content of each party's interest in the pledged asset. What was retained with the pledgor and what entitlements did this retained interest afford him? What passed to the pledgee and what entitlements and duties accompanied this interest? The basic idea behind these questions has already been addressed in many judgments and it is now trite that the cedent retains a reversionary interest in the ceded claim (bare dominium) and that the cessionary receives control of the asset (quasi-possession), which affords it the *locus standi* to enforce the ceded right. The major point is that the personal residual right remains an asset in the cedent's estate.

The main contribution of the *Retmil* case, in my view, is that of providing a solution to the conundrum that arises when the ceded personal right becomes enforceable or receivable before the cedent has defaulted on the secured loan. Davis AJ drew a distinction between the cessionary's right to receive payment and its right to appropriate such proceeds. If the cessionary receives payment before the secured debt becomes enforceable, it must keep the proceeds in trust for the cedent. Essentially the ceded personal right is substituted by the proceeds and

henceforth such funds — kept in a separate trust account — will serve as the object of security in the cessionary's possession. (Compare also *Rixom* at 213; *Twiggs v Millman NO & another* 1994 (1) SA 458 (C) at 466 for instances where the cessionary had to keep certain proceeds in trust for the trustee of the cedent's estate.) Only once the cedent defaults will the cessionary become able to use these funds to discharge the loan, after which the surplus must be paid to the cedent. The court did not address what the consequences upon the cedent's insolvency would be, but the logical implication is that the trustee of the insolvent estate would be entitled to administer the proceeds (which has been generally accepted since *National Bank of South Africa*). The cessionary must, on demand, hand these over to the trustee, but as pledgee the cessionary will have a preferred right to receive as much from these funds as would settle its proved secured claim if it is due and payable.

It can be considered in passing that the kind of solution presented by Davis AJ would work best in instances where the cessionary/pledgee is in the position to hold the funds of another in trust, otherwise such funds would, strictly speaking, fall in the cessionary's estate in the event of the latter's insolvency. This should not be a problem if the cessionary is a credit provider who is also a financial institution capable of keeping separate accounts in trust. Presumably in *casu Retmil* would therefore qualify under the broad definition of a financial institution for purposes of holding the proceeds in trust for Slabbert's estate (see s 1 sv 'financial institution' of the Financial Institutions (Protection of Funds) Act, 2001, read with s 1 sv 'financial institution' of the Financial Services Board Act, 1990). This 2001 Act provides in s 4(4) that '[a] financial institution must keep trust property separate from assets belonging to that institution, and must in its books of account clearly indicate the trust property as being property belonging to a specified principal', and in s 4(5) that '[d]espite anything to the contrary in any law or the common law, trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company' (see further Sharrock et al, *Hockly's Insolvency Law* 9 ed (Juta 2012) 76).

The case also confirms that, although the cession has the consequence that only the cessionary has *locus standi* to enforce the ceded right, the cedent retains a residual *locus standi* that enables it to protect its reversionary interest in the event that it is threatened in some manner that can be protected without prejudicing the cessionary's rights (see also *Van Zyl v Strandfontein Namaqualand Estates (Pty) Ltd* 1930 CPD

270 at 272; *Van Zyl NO v Look Good Clothing CC* 1996 (3) SA 523 (SE) at 528; *Development Bank of Southern Africa Ltd* para 50; *Harlequin Duck Properties 204 (Pty) Ltd v Fieldgate t/a Second Hand Rose & others* 2006 (3) SA 456 (C) at 472 for examples of cases in which a limited locus standi for the cedent was recognised for specific purposes).

It is inevitable that a cession in securitatem debiti creates a potentially complicated tripartite relationship between the cedent/pledgor, cessionary/pledgee and debtor. Although the ability to enforce the right passes to the cessionary and for almost all practical purposes the latter is now the debtor's new creditor, the relationship between the cedent and debtor is not completely severed either. While the cessionary is the only person entitled to accept and receive payment under the ceded right (in casu an insurance policy if the cedent is solvent), the cedent must be notified and may intervene in the matter in order to ensure that the cessionary enforces the ceded right in a proper manner that takes account of the cedent's reversionary interest. How this arrangement would play out in other contexts will have to be worked out on a case-by-case basis, but when dealing with a pledge of an insurance policy it seems workable.

It is sometimes suggested that, from the debtor's perspective, it matters little whether the cession is construed as a pledge or an out-and-out cession, since the cessionary's right against the debtor (and hence the debtor's obligation to the cessionary) is similar either way (compare, for example, *Rothschild v Lowndes* 1908 TS 493 at 501; *National Bank of South Africa* at 251; *National Bank of SA Ltd v Nel* 1916 CPD 148 at 151; *Kimberley Motor Supplies Co (Ltd) v Union Trade Promotion Co* 1938 GWLD 23 at 33; *Moola v Estate Moola* 1957 (2) SA 463 (N) at 464; *Nell v Barry NO en 'n ander* 1958 (2) SA 687 (O) at 692–693; *Sasfin (Pty) Ltd v Beukes*; *Suid-Afrikaanse Vervoerdienste v Sasfin (Pty) Ltd* 1988 (1) SA 626 (W) at 631; *Look Good Clothing CC* at 526). However, in view of what was explained above, this is not a completely accurate depiction, since the debtor remains in a residual relationship with the cedent (the erstwhile creditor) by virtue of the fact that the latter still holds 'ownership' of the personal right. Therefore, from the debtor's perspective it does indeed matter whether the cession was absolute or a pledge, since the latter approach entails a duty to interact with the cedent under certain circumstances — such as when the cedent disputes the way in which the cessionary is enforcing the personal right.

Life insurance policies will more often than not include stipulations regarding the insured's ability to cede or pledge his rights under the

policy. The chances are also good that there will be a requirement that the insured who intends to dispose of their rights in some manner, such as to cede or pledge them, must notify the insurer (or obtain permission). The details will depend on the insurance contract. Accordingly, in the insurance context the debtor (insurer) will usually have knowledge of the fact that the cedent (insured) has pledged the policy. The insurer will know that it must pay the cessionary, but it must also take careful notice of the fact that it might nonetheless still be called upon to engage with the cedent if the latter disputes the amount payable to the cessionary. Once there is an agreement or settlement regarding the amount that must be paid but the pledge is not enforceable, the insurer should pay it into a specially designated trust account of the cessionary, where it will be kept in trust for the cedent. The cessionary's right of pledge will extend over the asset represented by the funds in the trust account. If the cedent is insolvent, the insurer must on request pay the proceeds to the trustee of the cedent's insolvent estate and not to the cessionary, but the latter will have a secured claim to such proceeds for the amount outstanding on the secured loan.

## VI CONCLUSION

The creative way in which the court distinguished between the pledgee's right to receive payment and the right to appropriate such proceeds is a useful step towards conceptual clarity and a functional approach to cession in securitatem debiti. It is also interesting that the principles relating to the holding of funds in trust seem capable of playing a supplementary role in the resolution of certain practical problems. It remains to be seen whether the solution given in *Retmil* will stand the test of further application in practice. There is no doubt that as more questions and new problems come up, we will have to be willing to develop our conceptual understanding of the law of pledge in new and innovative ways so as to get the most practical functionality out of this important legal institution.